



N.A.S.D. AWARD

Arbitration

NATIONAL ASSOCIATION OF SECURITIES DEALERS

National Association of  
Securities Dealers, Inc.  
NASD Financial Center  
33 Whitehall Street  
New York, New York 10004

In the Matter of the Arbitration Between

Name of Claimant

Mary Elizabeth Murray

90-03198

Name of Respondents

Prudential Securities Inc  
Gerald Swirsky

REPRESENTATION

For Claimant Mary Elizabeth Murray ("Claimant"): David E. Shellenberger a sole practitioner.

For Respondents Prudential Securities, Inc. ("Prudential Securities, Inc.") and Gerald Swirsky ("Swirsky"): Paul Giappone of Prudential Securities, Inc.

CASE INFORMATION

Statement of Claim filed: November 9, 1990.

Amended Statement of Claim filed: June 25, 1991.

Claimant's Submission Agreement signed on: October 31, 1990.

Joint Statement of Answer filed by Respondents, Prudential Securities, Inc. and Swirsky on: February 22, 1991.

Respondent, Prudential Securities Inc.'s Submission Agreement signed on: February 22, 1991.

Respondent, Swirsky's Submission Agreement signed on : March 1, 1991

HEARING INFORMATION

Hearing Date(s)/Sessions: July 23, 1991/2 sessions.  
July 24, 1991/2 sessions.

Hearing Location: NASD, Inc./Boston, MA.

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CASE SUMMARY

Claimant alleged she was unsophisticated regarding investments and relied solely on Swirsky's advice and that at times Swirsky exercised discretion in this account. Claimant stated she was advised to seek professional review of the handling of her account. Claimant alleged she sent letters to Respondent Prudential Securities, Inc. asking her account be terminated and liquidated.

Claimant alleged her account was churned and that Swirsky placed her in unsuitable investments. Claimant alleged commission credits on Data Switch ranged as high as 18.6%. Claimant stated that many of the positions created by Respondents were excessive in relation to the equity in her account.

Claimant alleged that since her account was failing to produce the income required, she apprised Swirsky of her need for additional funds, whereby Swirsky had Claimant sign a margin agreement. Claimant stated she did not understand how a margin account operated and that she was incurring interest charges in her margin account.

Claimant asserted an "activity letter" was sent to her purporting to seek her approval of the handling of her account. However, it failed to disclose the level of commissions, that most of the securities purchased were speculative, or that the frequency of transactions was inappropriate.

Respondents alleged Claimant represented to Swirsky that her investment objective was income, she had 15 years of investment experience in stock and bonds and a net worth in excess of \$125,000.00.

Respondents stated that prior to all transactions Swirsky would always discuss and advise Claimant of the risks and benefits attendant to each of her investments. Respondents asserted Swirsky never exercised any discretion in this account.

Respondents asserted Claimant never voiced any dissatisfaction with the handling of her account. Respondents stated Claimant requested a termination of activity and sought to recoup losses sustained in the account for the past 5 years on the suggestion of a tax preparer.

Respondents maintained Claimant received confirmation slips and monthly statements detailing her investments and their respective performances. Respondents further maintained that Claimant, where appropriate, was provided with prospecti.

Respondents stated that, if any investments were unsuitable, Claimant had a duty to inform Respondents and demand a rescission.

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RELIEF REQUESTED

Claimant requested: compensatory damages in the amount of \$380,136.00; punitive damages in the amount of \$200,000.00; interest; costs; and attorneys' fees.

Respondents requested: a decision be entered dismissing the Statement of Claim in its entirety.

AWARD

The parties have agreed the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1- Respondents, Swirsky and Prudential Securities, Inc. are liable, jointly and severally, to the Claimant in the amount of \$370,260.00. The damages were assessed as follows:

a- Respondents Prudential Securities, Inc. and Gerald Swirsky are jointly and severally liable to the Claimant for compensatory damages and shall pay to Claimant the sum of ONE HUNDRED TWENTY FIVE THOUSAND AND 00/100 DOLLARS (\$125,000.00), per stipulation of the parties;

b- Respondents Prudential Securities, Inc. and Swirsky are jointly and severally liable to the Claimant for opportunity costs and shall pay to Claimant the sum of ONE HUNDRED FORTY FIVE THOUSAND AND 00/100 DOLLARS (\$145,000.00);

i- Opportunity costs are awarded in reliance on the following cases: Miley v. Oppenheimer & Co., Inc., 637 F.2d 318, 326-28 (5th Cir. 1981); Redstone v. Goldman, Sachs & Co., 583 F. Supp. 74, 76-77 (D. Mass. 1984); Rolf v. Blyth, Eastman, Dillon & Co., Inc., 570 F.2d 38, 49 (2nd Cir. 1978) cert. den. 439 U.S. 1039;

c- Respondents Prudential Securities, Inc. and Swirsky are jointly and severally liable to Claimant for attorneys' fees and shall pay to Claimant the sum of EIGHTY THOUSAND AND 00/100 DOLLARS (\$80,000.00). Respondents Prudential Securities, Inc. and Swirsky are also jointly and severally liable to Claimant for the costs incurred regarding the expert witnesses, and shall

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pay to Claimant the sum of THREE THOUSAND NINE HUNDRED SIXTY AND 00/100 DOLLARS (\$3,960.00) regarding Mr. Dowd and shall pay to Claimant the sum of FIVE THOUSAND FIVE HUNDRED AND 00/100 DOLLARS ( \$5,500.00) regarding Mrs. Calhoun;

1- Attorneys' fees and costs are awarded in reliance on M.G.L. c. 110A, Section 410, which provides for an award of costs and reasonable attorneys' fees for violations of the Massachusetts Securities Act. Arbitrators have the inherent equitable power to fashion appropriate awards. Raytheon Co. v. Automated Business Systems Inc., 882 F.2d 6, 11-12 (1st Cir. 1989); "Remedies After Raytheon: Avoiding Escalation and Risks of arbitrating," 18 Mass. Lawyers' Weekly 349 (Nov. 13, 1989) (hereinafter referred to as "Remedies After Raytheon");

2- Respondent Prudential Securities, Inc. is liable for and shall pay to Claimant punitive damages in the sum of FIFTY THOUSAND AND 00/100 DOLLARS (\$50,000.00);

a- Punitive damages are awarded based on the principle that punitive damages are an appropriate element of damages in securities arbitration and litigation. Arbitrators have the inherent power to award punitive damages, see Raytheon, supra, 882 F.2d at 11-12, and "Remedies After Raytheon";

3- Respondents Prudential Securities, Inc. and Swirsky are jointly and severally liable to Claimant for interest and shall pay to Claimant the sum of TEN THOUSAND AND 00/100 DOLLARS (\$10,000.00);

4- All other claims are dismissed.

#### FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the NASD, Inc. shall retain the \$200.00 non-refundable filing fee previously deposited by Claimant and the following Forum Fees are assessed:

4 sessions X \$750.00 = \$3,000.00.

Forum fees Assessed Against: Respondents, jointly and severally, in the amount of \$3,000.00;

Hearing session deposit required by Claimant was waived so no return of deposit is required.

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Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

/s/  
Barry M. Freedman/Industry Arbitrator

/s/  
David B. Salzman/Public Arbitrator

/s/  
Peter Brabbe/Public Arbitrator

Date of Decision: August 26, 1991

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ATTACHMENT A

REPORT OF ARBITRATORS

Punitive damages were based upon the panel's conclusion that Prudential Securities, Inc. had demonstrated a conscious disregard of the Claimant's rights and an opened-eyed reckless disregard for the Claimant's money. The panel also concluded that Prudential Securities, Inc.'s supervision of Swirsky and Claimant's account was nearly absent. The panel concluded Prudential Securities, Inc. was interested primarily in the substantial fees produced by the Respondent Swirsky in this account. The panel further concluded Prudential Securities, Inc. had actually taken steps designed to protect itself from liability, rather than protect the customer from her substantial losses.